

**Michigan Supreme Court**

*State Court Administrative Office*

**Final Report on Investigative Follow-up Review, Statewide Phase**

**to the**

**Michigan Office of the Auditor General**

**Performance Audit of Selected Probate Court Conservatorship Cases**

**January 2005**

## Introduction and overview

This report concludes a statewide review of Michigan probate courts' handling of conservatorship cases. Some background is helpful in understanding the genesis and scope of this review.

In October 2003, the Michigan Office of the Auditor General (OAG) issued its "Performance Audit of Selected Probate Court Conservatorship Cases." The report, which focused on selected conservatorship cases from five probate courts (Calhoun, Huron, Jackson, Washtenaw, and Wayne), suggested that the courts were doing a poor job overseeing conservatorship cases. The audit procedures included examination of probate courts' and conservators' files and activities primarily for the period October 1, 1998, through December 31, 2001. The audit concluded that:

1. The assertions contained in conservators' annual accountings filed with probate courts were generally not accurate or valid.
2. Probate courts' procedures and controls for administering and monitoring conservatorship cases were generally not effective.

In its preliminary response to the OAG report, the State Court Administrative Office (SCAO), the administrative arm of the Michigan Supreme Court, committed to reviewing each file covered by the report. SCAO also committed to taking any appropriate corrective action, including referral to the proper authorities for criminal prosecution and reporting attorney conservators to the Attorney Grievance Commission. SCAO issued an interim report (see discussion below), which concluded that the courts covered by the OAG report, with the exception of Washtenaw County Probate Court, complied with statutory requirements for monitoring conservatorship cases.<sup>1</sup> In large part, cases that were identified by the OAG audit as instances of possible wrongdoing turned out to be situations where conservators simply did not have enough background or training to carry out their responsibilities. But Washtenaw County Probate Court did have significant issues, including a number of cases where conservators either took money from wards' funds without court permission, or had the court's permission to do so but failed to repay the money.

This final report is the result of SCAO's second review. At the direction of the Michigan Supreme Court, in addition to reviewing the cases covered by the Auditor General's report, SCAO also committed to a statewide review of the remainder of Michigan's 83 probate courts. Moreover, SCAO monitored the reorganization of Washtenaw County Probate Court, which had a change in leadership after the initial SCAO review revealed problems with a number of conservatorship cases, as well as systemic problems in the court. Thanks to a sweeping review of court practices and individual cases, the Washtenaw Probate Court, under the leadership of Chief Judge Archie Brown and Chief Judge Pro Tem Donald E. Shelton, has recovered over \$290,000 for court wards. Corrective action included 11 referrals for criminal prosecution.

In conducting the statewide review, SCAO had the full cooperation of the state's probate court judges and staff, who appreciated the opportunity to improve their practices regarding oversight of conservators. SCAO reviewed both court procedures and a random sampling of each court's conservatorship cases.

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<sup>1</sup> In fact, the OAG report did not find any issues with cases from Jackson County Probate Court.

For the 78 probate courts not covered in the original OAG audit:

- Twenty-seven courts received a “satisfactory” rating (completed June 2004).
- Thirty-nine courts were notified that SCAO had identified limited problem areas. Each of these courts was directed to respond with a corrective action plan within 30 days, stating what actions the court would take and when the court would address the issues identified in the review. All 39 courts have complied with SCAO’s directive. SCAO followed up with each court to ensure their compliance with these corrective action plans (completed September 2004).
- Ten courts were identified as needing management assistance from SCAO. SCAO contacted the chief judge of each court to describe problem areas identified during the review. SCAO then provided on-site management assistance to each court to correct these problems. This phase was completed in November 2004.
- Two courts were identified as having more serious problem areas that merited a compliance audit, which included bringing in outside auditors to review the courts’ practices. This phase was completed in October 2004.

In sum, the statewide review revealed that the vast majority of probate courts were either following the Estates and Protected Individuals Code (EPIC), and had appropriate procedures, or had minor issues that were quickly corrected following SCAO’s review. All probate courts where SCAO identified problem areas now have definitive corrective action plans in place to address any deficiencies. SCAO will continue to follow up with the courts to ensure continued compliance with those plans; those steps are described later in this report. In addition, SCAO continues to monitor the two courts that were the subject of compliance audits.

Thanks to the statewide review, all probate courts are now more aware of the issues surrounding conservatorship cases and are more prepared to take appropriate action to ensure that conservators follow EPIC and applicable court rules.

In addition, the preliminary and statewide reviews both demonstrated that, under EPIC, there are limits to court review of conservatorship files. EPIC, which became effective in 2000, places the burden on interested parties – not the courts – to raise accounting issues and notify the court of suspected wrongdoing by conservators. This approach is effective, and helps preserve estate assets, where there are interested parties who are vigilant on the protected individual’s behalf. In many situations, however, the protected individual does not have relatives or friends who are willing or able to take on that oversight role. Wards in those situations are particularly vulnerable. Too, as was demonstrated in a number of Washtenaw County cases in which a parent wrongly appropriated funds from a child’s estate, even where interested persons are involved, they may not have the protected individual’s best interests at heart. The OAG audit, which included OAG reviewers going to conservators’ offices to review their files, revealed issues with some cases that would not be disclosed in the limited review that EPIC imposes on probate courts. EPIC’s limitations are for the Legislature to consider.

## ***Probate courts and conservatorships***

Each of Michigan's 83 counties has its own probate court, with the exception of 10 counties that have consolidated to form five probate court districts.<sup>2</sup> Each district has one judge, and each of the remaining counties have one or more judges, depending in large part on the population and caseload within the county. Probate courts have jurisdiction over admission of wills, administration of estates and trusts, guardianships, the treatment of mentally ill and developmentally disabled persons, and conservatorships.

Probate courts appoint conservators to manage the financial affairs of court wards, usually children or other persons who cannot manage their own finances and property.<sup>3</sup> A conservator's responsibilities include ensuring that the ward's estate is not wasted and that funds are dispersed for the ward's care and support, or for the care and support of the ward's dependents. The conservator files an initial inventory of the ward's assets and every year files an annual accounting with the probate court, showing disbursements from and any income to the ward's estate. Before allowing an accounting, the court may hold a hearing following notice to interested parties, such as the ward and the ward's dependents. Interested parties may appear at the hearing and voice any objections to the accounting. If the conservator files a Waiver/Consent form signed by each interested party, the court may allow the accounting without holding a hearing.

As of December 2003, conservators were assigned to 33,247 adults and children in Michigan. In about seventy-five percent of those cases, the conservators were related to the court wards.

The trend in Michigan, as in many other states, has been to preserve estate assets by limiting costly court supervision of conservatorships. Under a 1939 law, Michigan probate courts were charged with examining estate transactions. The resulting delays and costs led many to try to operate outside the probate system. This statute was replaced in 1978 by the Revised Probate Code (RPC), which introduced the concept of independent probate administration as a less-expensive, less time-consuming alternative to court-supervised administration. Independent administration, which involved almost no court oversight, became very popular with the public. In 1998, RPC was in turn replaced by the EPIC, which became effective on April 1, 2000.<sup>4</sup>

MCL sections 700.1101 - 700.1512 and 700.5401 - 700.5433, and Michigan Court Rules subchapters 5.100 – 5.900, regulate conservatorships in Michigan. Conservators are required to:

- Fulfill all the duties and obligations of a confidential and fiduciary relationship, including loyalty, impartiality, care, prudence in action, and segregation of assets.
- Conform to the Michigan prudent investor rule.
- Avoid self-dealing and observe other limitations on transactions with the estate.
- Prepare and file estate inventories and annual accountings.
- Comply with accounting requirements for trusts and physical checks of estates, as specified by the court.

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<sup>2</sup> Alger and Schoolcraft; Charlevoix and Emmet; Clare and Gladwin; Luce and Mackinac; Mecosta and Osceola.

<sup>3</sup> For example, courts may appoint conservators for people who suffer from mental or physical illness, are disabled, are detained by a foreign power, or have disappeared.

<sup>4</sup> 1998 PA 386; Michigan Compiled Laws 700.1 *et seq.*

- Maintain suitable records and be prepared to make them available.
- Comply with certain limitations on selling or otherwise disposing of property.
- Observe requirements and limitations on expending or distributing estate money.

### ***SCAO interim and statewide reviews***

On October 24, 2003, the OAG released its Performance Audit of Selected Probate Court Conservatorship Cases in five Michigan probate courts.

As noted above, the Michigan Supreme Court responded by directing SCAO to undertake a two-part review: first, examine all cases cited in the OAG audit, and second, review all state probate courts' handling of conservatorship cases. With both the interim and statewide reviews, SCAO focused on whether the courts had violated either EPIC or applicable court rules.

**Interim report.** SCAO's interim report<sup>5</sup>, issued on May 21, 2004, included each conservatorship case examined in the OAG performance audit. In the 27-page report, SCAO identified a number of cases with suspected improprieties, mainly cases in which conservators had either taken loans from the ward's estate without court approval or had obtained the court's approval for the loan, but had failed to pay it back. In these cases, the conservator was most often the ward's parent (see discussion of Washtenaw County Probate Court below). At least three such cases were referred for possible criminal prosecution.

Apart from these instances, however, the review did not find widespread misappropriation of funds. SCAO concluded that, in many instances, conservators were not trying to misappropriate funds or abuse the system, but simply did not realize what was required of them.

**Washtenaw Probate Court.** The OAG's October 2003 report indicated that, in Washtenaw County Probate Court, conservators had improperly appropriated ward funds and that the Washtenaw court had failed to prevent these losses. SCAO's subsequent review of Washtenaw cases indicated a variety of problems in addition to those identified in the audit. Problems raised by the review included failures of the restricted bank account process, "administrative closing" of delinquent cases, authorization of fund withdrawals without hearings and/or the court's approval, and various office inefficiencies.

Following this initial SCAO review, the Supreme Court appointed Washtenaw County Circuit Judge Archie Brown as Chief Judge of the Washtenaw County Probate Court. Judge Brown in turn appointed Circuit Judge Donald E. Shelton to serve as Chief Judge Pro Tem of the Probate Court. Judge Shelton's charge included investigating the problems SCAO had identified and reorganizing the probate court's operations to avoid a recurrence of those problems.

Rather than focus only on the cases that were randomly selected for the OAG audit, the Washtenaw Court conducted a complete investigation of all open cases. Ultimately, the court identified 136 problem cases, including those reviewed in the OAG report. The court then conducted hearings on all 136 cases over a period of several months. In each case, the court attempted to locate the conservator, the ward, any attorneys on the case, and any involved financial institution. Court staff then attempted to determine the location, status, and balance of funds for each court ward. Once the court located the parties in a case, the court issued show cause orders requiring the parties to appear and explain the status

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<sup>5</sup> The interim report is available at <http://www.courts.michigan.gov/scao/resources/publications/reports/Interim-Conservatorship-Response.pdf>.

of the ward's account. Some conservators did not respond to the show cause orders; the court issued bench warrants for their arrest. Conservators with outstanding arrest warrants were replaced by other conservators appointed by the court.

In each of the show cause hearings, the court took testimony, determined whether ward funds had been improperly appropriated, and issued remedial orders. In 12 cases, the court found that a financial institution had improperly disbursed ward funds from a restricted bank account. In those cases, the financial institutions were found in contempt and ordered to replace the funds with interest. Conservators who misappropriated funds were found in contempt, ordered to repay the funds with interest, and replaced by court-appointed successor conservators.

Because of these efforts, as of October 29, 2004, the court recovered \$293,000 in misappropriated funds and fees, with thousands more being repaid each month through payment plans. In 11 cases, the court found the actions of the conservator so egregious that those matters were referred to the Washtenaw County Prosecutor for possible criminal proceedings.

In addition, the Washtenaw probate court instituted sweeping systemic changes, addressing matters ranging from fiduciary training to attorney appointments to office efficiencies. These measures, which are directed at conservatorships and other probate court cases, include:

- Encouraging conservators to get help from attorneys. Many problem cases involved conservators who were acting without legal advice. The court established a system to train, appoint, and monitor assigned counsel. These attorneys also provide free one-on-one monthly counseling sessions for conservators and others.
- Requiring conservators to undergo mandatory training.
- Establishing a series of "bright line tests" for estate inventories and annual accountings. If an inventory or account fails any of the tests, it is more thoroughly reviewed by the court's Deputy Register, who may also schedule a hearing.
- Completely revising the restricted bank account system. Through an application and selection process, three local banks were selected as approved institutions for conservators to deposit money into restricted accounts. Each bank has a detailed plan to ensure that the restricted account is flagged to prevent withdrawals that are not authorized by the court.
- Eliminating the positions of Probate Register and Probate Counsel. The court created the new position of Probate Register-Referee. The Register-Referee conducts initial hearings on probate cases, petitions to withdraw funds, and other matters, allowing the court to follow up on delinquent cases and take more immediate action to correct deficiencies.
- Making all probate court forms and instructions available online.
- Requiring a show cause hearing whenever a conservator fails to correct a filing defect within the time allowed.
- Generating automatic notices that are mailed to conservators 28 days before an annual report or accounting is due.

Of all state probate courts, Washtenaw initially presented the most serious problems, both in terms of individual cases and court processes. However, thanks to the efforts of the judges involved, particularly Judge Shelton, and court staff, the court has transformed its operations. Indeed, SCAO is considering some of the court's innovations as models for other probate courts.

**Statewide review.** The second, statewide phase of SCAO's review began with on-site conservatorship reviews of all Michigan probate courts. For each court, SCAO chose cases at random, reviewing documents and court processes to assess each court's performance. A standardized study guide was used for all reviews. These on-site reviews began in November 2003 and were completed in May 2004.

After the on-site reviews were completed, SCAO's next step was to review caseload and operational information from the on-site reviews and provide necessary follow-up and assistance.

As noted above, 27 courts received satisfactory ratings and did not require assistance or follow-up. Thirty-nine courts were notified that SCAO had identified limited problem areas. Each of these courts was directed to respond with a corrective action plan within 30 days, stating what actions the court would take and when the court would address the issues identified in the review. All 39 courts have complied with SCAO's directive. As of September 2004, SCAO followed up with each court to ensure their compliance with these corrective action plans. Many of the courts in these two groups had local policies that provided more oversight and supervision of conservatorships than is required by EPIC or the court rules.

For 10 courts, SCAO identified problem areas during the on-site review that warranted on-site management assistance from SCAO. SCAO staff helped the courts develop court improvement/corrective action plans and met with judges and court staff.

At SCAO's direction, the two remaining courts, Livingston County Probate Court and Kent County Probate Court, underwent a compliance audit.

**Livingston County.** The compliance audit found that the court's handling of conservatorship cases was generally adequate. SCAO did find that the court is short-staffed; due to budgetary constraints, the staffing level has remained the same for the past 12 years, while Livingston County's population has increased rapidly. The audit noted that staff turnover has been a problem, particularly with the position of deputy register. (The court believes that this issue has been addressed by increasing the pay rate for that position.)

SCAO also found a number of problems related to conservatorship cases handled by a private, non-profit agency. The court appointed this agency when no other candidates, such as relatives or friends of the ward, were available. The court also appointed this agency in cases when other conservators were available but could not be bonded. The agency sometimes failed to submit itemized invoices for its services, did not always prepare accounts properly, sometimes charged excessive fees without explanation, and was not always timely in paying bills and submitting accounts. In addition, the court was not always consistent in following up on notices of deficiency. (The court's recent conversion to a new computer system has addressed the notice of deficiency issue.)

On SCAO's recommendation, the court is taking the following corrective steps:

- requiring the private agency to file a bond in each case in which the agency is appointed as conservator;
- appointing guardians ad litem to review cases where the conservator's request for annual fees exceeds \$2,000;

- mandating that the private agency must seek court approval of its fees and costs at the time the agency files the annual accounting and provide supporting documentation;
- requiring the private agency to document its communications with interested persons about fees and costs;
- deducting penalties for late payments from the conservator's fees, where the late payment is without good cause;
- issuing court orders that are specific about whether and when a conservator must file accounts; and
- putting court policies regarding conservatorships in writing for the benefit of court staff and the public.

SCAO recommended additional support staff for the court, while recognizing that new staff cannot be added without funding from the county.

**Kent County review.** An outside auditor conducted a detailed audit of 56 cases and reviewed an additional 39 cases in summary. While the auditor's overall impression was positive, it did find problems with a number of cases, including some where public conservators/guardians were appointed. As in Livingston County, the court appointed these public conservators/guardians where other potential fiduciaries, such as the ward's relatives and friends, were either unavailable or unsuitable.

The problems the auditor identified include:

- Untimely allowance of accounts. In some cases, the court allowed more than three years of accounts at one time.
- In one case, an order was entered approving three years of accounts while the court had adjourned a hearing on allowing the accounts.
- Lack of proof of service or incomplete proof of service. In some files, no proof of service appeared with the annual account. As a result, it could not be determined whether interested parties had been notified of hearings so that they could raise any objections to accountings. In other files, the proof of service was not complete, raising the question whether the interested parties were notified of hearings.
- Disbursements from estates without court order. In some instances, conservators withdrew funds from restricted accounts without a court order.
- Inaccurate and inconsistent accounting. Many conservators properly listed income and expenses in detail. Others listed income and expenses by time period or in total only.
- Notice of deficiency. In some cases, the court did not send the notice to the conservator on a timely basis; in other cases, the court failed to send the notice.
- Sales of real estate. In many cases, the ward's home is her or his most valuable asset. Some conservators sold their wards' homes at less than the market value; the homes were later resold for a significant profit, raising the question of whether the wards received adequate value for the sales.
- Apparent conflicts of interest. In some cases, conservators hired relatives or friends to perform services for the estate or the ward.

As with Livingston County, the auditor found that court staffing was an issue. Currently, eight court employees are responsible for over 13,000 cases each year. In May 2003, the court



lost one full-time employee due to budget cuts. The auditor recommended that the court hire at least one additional support staff member.

The auditor also recommended:

- Standards for public guardians and conservators. The standards recommended by the auditor would cover such matters as prudent investment of wards' assets, timely payment of wards' bills, and reasonable charges by public conservators/guardians for their services.
- Criteria for assigning additional cases. The court would only assign cases to public conservators/guardians who meet performance criteria and handle their caseloads appropriately.
- Disclosure of conflicts of interest. If a public guardian/conservator hires a related party – defined as a relative, friend, or co-worker – to perform services for the ward's estate, that expense item should appear on the annual accounting with the words "RELATED PARTY" so that such interactions are identified and can be probed by an interested party.
- Court approval of real estate transactions and valuation companies. A real estate company that wishes to list court wards' property would first have to be approved by the court, subject to the company's business history and agreement to release information about the transaction to the court. If the conservator/guardian seeks to sell a property at more than seven percent under market value, the property would be formally valued by a court-approved appraisal company.
- Review procedures for forms submitted to the court. The recommended review includes checking account beginning balances against the prior account's ending balance and requiring a proof of service with all annual accounts.
- Notice to conservators when annual accounts are due.
- Correction of software problems.
- Restructured workflow process.
- Education of public conservators/guardians about proper procedures when a court ward dies.

With SCAO's assistance, the court is implementing these and other recommendations by the auditor. The issue of additional court staff is, again, dependent on county approval and funding.

### ***Future action***

SCAO will continue to monitor the role probate courts play in conservatorship as well as other types of cases. As part of this ongoing supervision, SCAO will select courts at random each year for compliance audits.

SCAO's work with the probate courts will also include:

**Training materials.** A SCAO work group is developing training materials for conservators. These materials will be available to the public without charge on the Supreme Court web site in both manual and webcast format. In addition, SCAO will provide these training materials to probate courts for conservators who do not have internet access.

**List of best practices.** A list of “best practices” is available on the Supreme Court web site at <http://courts.michigan.gov/scao/resources/bestpractice/conservatorship.htm>. This list was compiled based on information SCAO gathered from various probate courts during the statewide review process. Judges and probate registers reported that these practices save court time and resources. These “best practices” are not all required by the Michigan Compiled Laws or court rules; the list was compiled as a guide to improving court oversight of conservatorship cases.

**Recommended court rule changes.** SCAO will recommend court rule changes to provide greater protection for wards’ assets. If adopted, the rules would impose these additional safeguards:

- Probate courts would be required to notify the financial institution when a fiduciary is suspended.
- Courts would appoint a special fiduciary if a fiduciary is suspended when there are assets in the estate.
- A conservator would attach a corresponding financial institution statement to all accountings to verify the assets on hand.
- When filing an accounting, a conservator would include a Proof of Service, showing that interested parties were served with the accounting (this is a clarification of a requirement that is already in place).
- Within 14 days of being appointed, a conservator would file with the court proof of the existence of a court-ordered restricted account.
- Conservators would be required to file with the court an annual verification of funds on deposit, with an attached statement from the financial institution for restricted accounts.
- Courts would either review or allow accounts annually, rather than every three years as is currently required.
- When filing a Petition for Approval of Sale of Real Estate, the conservator would have to include an assessor statement showing the state equalization value (SEV).
- If the conservator seeks to sell the real estate for less than two times the SEV, the court would further scrutinize the sale and could require the fiduciary to attach an appraisal by a court-approved appraisal company.

**Delinquent fiduciary report.** As a result of SCAO’s statewide review, probate courts have a heightened appreciation of how important it is for conservators and other fiduciaries to fulfill their responsibilities in a timely manner. Accordingly, the courts have enacted policies to deal promptly with delinquencies. For example, all courts now prepare and review a delinquent fiduciary report at least once a month.

SCAO is revising the bi-annual delinquent fiduciary report so it provides more meaningful data. It is expected that these changes will become effective in January 2007.

**Periodic reviews and court training.** Through periodic reviews of probate courts, SCAO will ensure probate courts’ continued compliance with EPIC and pertinent court rules. In addition, SCAO and the Whall Group, a private auditing firm based in Auburn Hills, will train probate judges and staff at three locations in the state. The training will focus on fraud prevention and detection.

## **Conclusion**

The report issued by the OAG in October 2003 provided an opportunity for the probate courts in Michigan to take a closer look at its conservatorship cases. As a result, the probate courts in this state are now running more efficiently and with a greater awareness of their role in conservatorship cases. Even before the OAG report was released, many probate courts went beyond EPIC's requirements in providing additional protections.

As mentioned in the interim report, Michigan law provides for less court oversight and greater responsibility for interested parties to detect and report fiduciary wrongdoing. This statutory structure was put in place to preserve estate assets by limiting costly court oversight. Unfortunately, many people are unfamiliar with the statutory requirements and overestimate the level of court oversight. The statute presumes that a court ward has interested persons who are both willing to serve and have the ward's best interests at heart, but this is not the case for many court wards. Such situations present the highest risk for fraud and other abuses of the system. In addition, SCAO's review revealed that probate courts have limited resources; the courts have to set priorities for meeting their responsibilities in order to use those resources effectively. Ultimately, it is for the Legislature to consider how best to protect these vulnerable individuals.